

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

FS MEDICAL SUPPLIES, LLC,

Plaintiff,

v.

TANNERGAP, INC. AND TANNER
PHARMA UK LIMITED,

Defendants;

and

FS MEDICAL SUPPLIES, LLC,

Plaintiff,

v.

TANNER PHARMA UK LIMITED;
RAYMOND FAIRBANKS BOURNE; MARY
EVERETT WHITEHURST BOURNE,

Defendants.

Case No. 3:21-CV-00501-RJC-WCM

Case No. 3:23-CV-00598-RJC-WCM

**DEFENDANTS' MEMORANDUM IN SUPPORT OF
RULE 12(b)(1) MOTION TO DISMISS AMENDED COMPLAINT**

FSMS's filing this evening reveals that this Court lacks federal subject matter jurisdiction over both cases that are a part of this long-running dispute. FSMS counsel informed defense counsel late today, on the eve of a hearing before this Court on several important motions, that one member of FS Medical Supplies, LLC is a citizen of China and a permanent resident of the United States. Her foreign citizenship destroys federal subject matter jurisdiction, and accordingly, this Court should immediately dismiss both *FSMS I* and *FSMS II* under Federal Rule of Civil Procedure 12(b)(1).

BACKGROUND

Tanner Pharma UK Limited (“TPUK”) is a private limited company under the laws of England and Wales. Dkt. 228 ¶ 9¹; Dkt. 63, Ex. I, TPUK Certificate of Incorporation. Its registered office is in St. Albans and its operational office is at nearby Harpendenbury Farm, Redbourn, Hertfordshire. Dkt. 228 ¶ 131. TannerGAP, Inc. (“TannerGAP” and together with TPUK, “Tanner Defendants”) is a corporation organized under the laws of North Carolina. Dkt. 228 ¶ 8. Its principal place of business is in Charlotte, North Carolina. *Id.* ¶ 6.

Raymond Fairbanks Bourne is an individual domiciled in Charlotte, North Carolina. FSMS II, Case No. 3:23-cv-00598 (“FSMS II”), Dkt. 91 ¶ 6. Mary Everett Whitehurst Bourne is an individual domiciled in Charlotte, North Carolina. *Id.* ¶ 7.

FSMS was formed as a Delaware limited liability company (“LLC”) on March 30, 2020. Dkt. 63, Ex. K, Delaware Entity Search. Its members are Laird Cagan and Jim Mao and their spouses. Dkt. 58 ¶ 7. Mr. Cagan and his spouse are citizens of Texas. FSMS II, Dkt. 103; Dkt. 58 ¶ 7. As to Jim Mao and his spouse, FSMS alleged in its Amended Complaint that they were both domiciled in California. Dkt. 58 ¶ 7; *see also* FSMS II, Dkt. 3. However, for the first time on February 10, 2025, FSMS informed counsel for the Tanner Defendants and the Bournes over a Zoom call that Mr. Mao’s spouse, Zhen Zhen Tong, is a Chinese citizen and permanent resident of California. Shortly thereafter, FSMS then filed an “Amended Citizenship Disclosure” showing her citizenship as “California/China.” FSMS II, Dkt. 103.

¹ Unless otherwise stated, docket cites refer to filings in FSMS I, Case No. 3:21-cv-00501.

STANDARD OF REVIEW

“Rule 12(b)(1) provides for dismissal of claims against all defendants where the Court lacks jurisdiction over the subject matter of the lawsuit.” *Ballentine v. Robinson*, No. 3:15-CV-00496-FDW-DSC, 2016 WL 3095224, at *2 (W.D.N.C. June 1, 2016). “The existence of subject-matter jurisdiction is a threshold issue a court must address before considering the merits of any case.” *Wiener v. AXA Equitable Life Ins. Co.*, No. 3:18-CV-00106-RJC-DSC, 2021 WL 5988273, at *1 n.1 (W.D.N.C. Sept. 20, 2021). “A federal court’s subject-matter jurisdiction is limited.” *Id.* “[T]he party seeking federal jurisdiction has the burden of proving that subject-matter jurisdiction exists.” *Id.* “Subject-matter jurisdiction can be raised at any time, including after trial, and courts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it.” *Id.* at *1. “If the Court lacks jurisdiction, it has no authority to hear any part of the case.” *Pitts v. Savage*, No. 3:21-CV-00286-RJC-WCM, 2022 WL 287544, at *1 (W.D.N.C. Jan. 31, 2022).

ARGUMENT

FSMS has purported to invoke this Court’s diversity jurisdiction under 28 U.S.C. § 1332. Dkt. 58 ¶ 5. FSMS pleaded that the requirements of Section 1332 were met because “all parties are citizens of different states and foreign states and the amount in controversy exceeds \$75,000.” *Id.* However, the information provided by FSMS’s counsel, as reflected somewhat ambiguously in its “Amended Citizenship Disclosure,” makes clear that this allegation was improper because one of FSMS’s members is a citizen of a foreign state. Because one of the Tanner Defendants—TPUK—is also a foreign citizen, this Court lacks diversity jurisdiction under Section 1332, and both actions must be dismissed.

“[D]istrict courts do not have subject matter jurisdiction over cases with permanent resident aliens or non-resident aliens on both sides of the suit.” *Jiuna Wang v. NYZ Mgmt. Servs., LLC*, No. 3:19-CV-00642-FDW-DSC, 2020 WL 2926477, at *3 (W.D.N.C. June 3, 2020); *Tagger v. Strauss Grp. Ltd.*, 951 F.3d 124, 125 (2d Cir. 2020) (“We hold that 28 U.S.C. § 1332(a)(2) does not confer diversity jurisdiction where a permanent resident alien sues a non-resident alien....”). “The presence of aliens on both sides of a controversy without diverse U.S. citizens cannot support diversity jurisdiction.” *La.-Pac. Corp. v. Akzo Nobel Coatings, Inc.*, No. 1:12-CV-625, 2014 WL 12672684, at *1 (M.D.N.C. Aug. 29, 2014). “[D]iversity is lacking where the only parties are foreign entities, or where on one side there are citizens and aliens and on the opposite side there are only aliens.” *Bayerische Landesbank, N.Y. Branch v. Aladdin Cap. Mgmt. LLC*, 692 F.3d 42, 49 (2d Cir. 2012); *accord Phoenix Trading FZCO v. Dennis Corp.*, No. 4:22-CV-02355-RBH, 2022 WL 18674462, at *2 (D.S.C. Aug. 29, 2022) (stating same).

“For purposes of diversity jurisdiction, the citizenship of a limited liability company is determined by the citizenship of all of its members.” *Hulsing Enterprises, LLC v. Fazio Mech. Servs., Inc.*, No. 1:21-CV-00152-MR-WCM, 2021 WL 3009006, at *1 (W.D.N.C. July 15, 2021). Where one of the members of an LLC is a citizen of a foreign state, the entire LLC is treated as a citizen of a foreign state for purpose of diversity jurisdiction. *FPACP4 LEX, LLC v. Stantec, Inc.*, 586 F. Supp. 3d 824, 826 (N.D. Ill. 2022) (holding that an LLC with at least one foreign member was a foreign LLC, even if the LLC had some “members who are citizens of a domestic state”); *see also N.Y. Metro. Reg’l Ctr., L.P. II v. Mammoet USA Holding, Inc.*, 552 F. Supp. 3d 451, 456 (S.D.N.Y. 2021) (“[F]or purposes of Section 1332(a), a ‘single artificial entity’ party is but one party and that its citizenship—and only its citizenship—matters for purposes of complete diversity. Put differently, a ‘single artificial entity’ cannot . . . be disaggregated, with its members being

treated as ‘distinct parties with their own citizenship, as if the partners were personally named as parties.’”).

Here, because FSMS has a foreign citizen as member, it is treated as a foreign entity. Because TPUK is also a foreign entity, there are foreign entities on both sides of *FSMS I* and *FSMS II*. As a result, this Court lacks subject matter jurisdiction, and both cases must be dismissed.

CONCLUSION

This Court should dismiss *FSMS I* and *FSMS II* for lack of subject matter jurisdiction.

This the 10th day of February, 2025.

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Artificial Intelligence Certification

Pursuant to the Court's June 18, 2024 Order, 3:24-mc-104, I hereby certify that:

- No artificial intelligence was employed in doing the legal research for the preparation of this document, with the exception of such artificial intelligence embedded in standard on-line legal research sources such as Westlaw, Lexis, FastCase, and Bloomberg; and
- Every statement and every citation to an authority contained in this document has been checked by an attorney at this firm and/or paralegal working at their direction as to the accuracy of the proposition for which it is offered, and the citation to authority provided.

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